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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOSE R. ARZOLA,

Plaintiff and Appellant,

v.

FCA US, LLC,

Defendant and
Respondent.

B286417

(Los Angeles County
Super. Ct. No. BC571654)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Rosner, Barry & Babbitt, Hallen D. Rosner and Michelle A. Cook, for Plaintiff and Appellant.

Nixon Peabody and Jennifer A. Kuenster, and David H. Tennant for Defendant and Respondent.

INTRODUCTION

Appellant contends the trial court was without jurisdiction to order him to arbitrate his claim against a vehicle manufacturer that neither signed the dealer's contractual arbitration provision nor joined in the dealer's motion to compel arbitration. Because the trial court did not lack jurisdiction in the "fundamental" sense, appellant forfeited the issue by failing to raise it in the trial court. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 27, 2012, plaintiff and appellant Jose Arzola purchased a pre-owned 2012 Dodge Caravan from West Covina Nissan, LLC (WCN).¹ The manufacturer's warranty, issued by defendant and respondent FCA US LLC (FCA), was still in effect. In 2015, after a number of repairs, including a transmission rebuild that was covered by the FCA warranty, Arzola determined the vehicle was defective and filed suit against WCN and FCA for damages, penalties, and attorney fees under the Song-Beverly Consumer Warranty Act. (Civ. Code, § 1790 et seq.).

Relying on the arbitration agreement in the retail installment sales contract, WCN filed a motion to compel arbitration.² WCN also asked the trial court to exercise its

¹ The complaint alleged the vehicle was leased. But in his briefs, Arzola describes the transaction as a purchase. Arzola's declaration in opposition to the motion to compel arbitration also confirms the transaction was a purchase.

² The arbitration provision provided in part, "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and

discretion to order the entire matter into arbitration, even as to nonsignatory FCA. FCA did not join in the motion; instead, it filed a “notice of non-opposition.”

In his written opposition to WCN’s motion, appellant argued the arbitration provision was procedurally and substantively unconscionable. Alternatively, appellant urged his single cause of action for relief pursuant to the Song-Beverly Consumer Warranty Act was based on the manufacturer’s express vehicle warranty and, “in order to properly determine whether [WCN] can compel arbitration of [appellant’s] Song-Beverly claim against both [WCN] and FCA, the [trial] [c]ourt must necessarily determine whether the parties *intended* to contract and include [appellant’s] potential Song-Beverly claim with the arbitration provision at issue.”

Appellant did not seek to avoid arbitration against FCA on the basis the manufacturer was not a signatory to the retail installment sales contract. Appellant did not complain that FCA failed to file its own motion to compel arbitration or to properly file a joinder to WCN’s motion.

The trial court issued a tentative ruling before the hearing on the motion to compel arbitration. The tentative ruling did not address whether FCA should be included in an arbitration order,

the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.”

nor did counsel discuss the point at the hearing.³ The trial court adopted the tentative ruling, granted the motion, and ordered the entire matter to arbitration. Court proceedings were stayed in the interim.

Seven months after the trial court ordered the case to arbitration, appellant voluntarily dismissed WCN from the action, without prejudice. The dispute proceeded to arbitration against FCA only. After a one-day hearing, the arbitrator issued a seven-page decision in favor of FCA, with each side to bear its own costs and fees.

No one petitioned the trial court to confirm the arbitration award. Instead, the parties stipulated to the trial court's entry of a judgment confirming the arbitration award. The stipulation stated it was without waiver of the parties' "defenses/arguments/rights on appeal." Although the trial court promptly signed the stipulation as presented by the parties, the parties failed to obtain and file a judgment. We advised counsel we were without jurisdiction to entertain the appeal until a judgment was entered. A judgment was subsequently entered on January 23, 2019. We treat the November 17, 2017 premature notice of appeal as timely.

³ The record on appeal includes the reporter's transcript of the hearing.

DISCUSSION

1. *Appellant Has Forfeited his Appellate Issues*

Appellant asks this court to decide two issues he concedes were not raised in the trial court⁴: (1) Whether the trial court lacked jurisdiction to order appellant to arbitrate against FCS, and (2) if the trial court had jurisdiction, did it abuse its discretion in ruling as it did? Appellant does not reprise his trial court complaints that the arbitration agreement was procedurally and substantively unconscionable and not intended to encompass a Song-Beverly warranty claim.

As a preliminary matter, appellant has not addressed his standing to appeal from a judgment to which he stipulated. Ordinarily, a party may not appeal from a stipulated judgment. (*Cadle Co. II, Inc. v. Sundance Financial, Inc.* (2007) 154 Cal.App.4th 622, 624.) The reason, of course, is that the doctrine of invited error estops an appellant from challenging a judgment to which he consented. (*People v. DeJongh* (2015) 237 Cal.App.4th 1124, 1130.)

Nonetheless, we recognize an order compelling arbitration is interlocutory and not itself appealable.⁵ As appellant notes,

⁴ Based on the arbitrator's decision, it appears the issues were not raised in the arbitration proceedings.

⁵ A party aggrieved by an order compelling arbitration is not without prejudgment options. The order may be challenged via a petition for extraordinary relief. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160-161). And the trial court retains "its inherent jurisdiction to reconsider" an order compelling parties to arbitrate their dispute. (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 237.) Appellant did not pursue either option.

reviewing courts have held that a party dissatisfied with an arbitration award may stipulate to entry of an adverse judgment and still appeal the decision to order the matter into arbitration. (*Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 94 (*Ashburn*).) Although the circumstances in *Ashburn* and the opinion upon which it relies, *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576 (*United Firefighters*), differ considerably from those in this case, it is not necessary to discuss those opinions in any detail. Suffice it to say, in both *Ashburn* and *United Firefighters*, after the appellants stipulated to adverse judgments, they reprised on appeal only issues they litigated in the trial court.

Appellant indisputably has not done that. Instead, appellant insists that because his appeal presents only a pure question of law, i.e., whether the trial court lacked jurisdiction to compel arbitration against FCA, the issue may be raised for the first time on appeal.

That statement is accurate when an appellant asserts the trial court lacked fundamental jurisdiction to hear or determine a matter. Any resulting order or judgment is void, and the lack of fundamental jurisdiction may be raised for the first time on appeal. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339 (*Kabran*).)

Not so, however, when the complained-of error is the result of a trial court's acting in excess of its jurisdiction. A trial court acts in excess of its jurisdiction when it has fundamental jurisdiction, but "the Constitution, a statute, or relevant case law may constrain the court to act only in a particular manner, or subject to certain limitations.' . . . [C]ourts that violate procedural requirements, order relief that is unauthorized by

statute or common law, or otherwise ‘fail[] to conduct [themselves] in the manner prescribed’ by law [act] “‘in excess of jurisdiction.’” (*Kabran, supra*, 2 Cal.5th at pp. 339-340.) An act in excess of a trial court’s jurisdiction results in an order or judgment that “is ‘valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time’ [citation]. In contrast to errors concerning a court's fundamental jurisdiction, ‘[e]rrors which are merely in excess of jurisdiction should be challenged directly . . . and are generally not subject to collateral attack once the judgment is final. . . .’” (*Kabran, supra*, 2 Cal.5th at p. 340.); see also *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 840, fn. omitted [“There are essentially two kinds of jurisdictional errors with different consequences”].)

In *Kabran, supra*, 2 Cal.5th 330, the prevailing defendant opposed the plaintiff’s motion for new trial on several grounds, but did not object that the plaintiff’s moving papers were untimely. The trial court granted the plaintiff’s motion for new trial, relying in part on an untimely-filed affidavit. (*Id.* at p. 335.)

For the first time on appeal, the defendant argued the untimely affidavits deprived the trial court of jurisdiction to grant the plaintiff’s motion for new trial. (*Kabran, supra*, 2 Cal.5th at p. 335.) The Court of Appeal rejected the contention, as did the Supreme Court: “We hold that the trial court had fundamental jurisdiction to consider [the plaintiff’s] allegedly untimely filed affidavits in support of her motion for a new trial. The [defendant], having failed to object to the affidavits’ timeliness in the trial court, may not challenge the trial court’s

reliance on those affidavits for the first time on appeal.” (*Id.* at pp. 347-348.)

This appeal fails for the same reason. The trial court had in personam jurisdiction over FCA and fundamental, subject matter jurisdiction to rule on WCN’s motion to compel arbitration. Appellant never complained in the trial court—either when the motion to compel was made or post-arbitration—that FCA was not a signatory to the retail installment sales contract and did not comply with the procedural requisites for compelling arbitration. For the first time on appeal, however, appellant argues these omissions deprived the trial court of jurisdiction to compel arbitration against FCA. As with the plaintiff in *Kabran*, appellant’s challenge comes too late. Appellant’s inaction in the trial court resulted in the forfeiture of these issues on appeal. (*Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 511 [appellant “may not simply sit by in silence, take his chances on a favorable judgment and then, after an adverse judgment, complain on appeal”]; *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328 [“The ‘bright line’ for application of forfeiture does not lie between those who voluntarily invoke the arbitration process and those who are dragged to the table against their will. The forfeiture rule exists to avoid the waste of scarce dispute resolution resources, and to thwart game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome”].)⁶

⁶ By failing to preserve the jurisdictional challenge, appellant similarly failed to preserve the contention that the trial court abused its discretion in ordering him to arbitrate his claims against FCA.

2. *Request for Judicial Notice of FCA 2012 Dodge Caravan
Warranty is Denied*

Appellant asks this court to take judicial notice of FCA's express warranty for the 2012 Dodge Caravan. Appellant's counsel submitted a declaration with the request, averring that she downloaded a copy of the warranty from the Internet. Appellant did not ask the trial court to take judicial notice of the warranty, but argues it is relevant on appeal "because it does not include a binding arbitration provision . . . [and] shows that, having been compelled to binding arbitration against FCA, [a]ppellant was deprived of his bargain under the [w]arranty to *not* be subject to binding arbitration." We decline the request.

Appellate courts typically do not take judicial notice of evidence not presented in the trial court. (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 763.) In any event, for the reasons discussed, we do not reach the merits of the appeal, so the warranty is not relevant to our review or disposition.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

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DUNNING, J.*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.